

ORDER OF THE GENERAL COURT (Fifth Chamber)

15 December 2009*

In Case T-107/06,

Inet Hellas Ilektroniki Ipiresia Pliroforion EPE (Inet Hellas), established in Athens (Greece), represented by V. Khatzopoulos, lawyer,

applicant,

v

European Commission, represented by G. Zavvos and E. Montaguti, acting as Agents,

defendant,

* Language of the case: Greek.

APPLICATION for annulment of the decision allegedly contained in the Commission's letter of 31 January 2006 concerning the rejection, by the body responsible for the organisation, administration and management of the .eu top-level domain, of the applicant's request for registration of '.co' as a second-level domain,

THE GENERAL COURT (Fifth Chamber),

composed of M. Vilaras, President, M. Prek and V.M. Ciucă (Rapporteur), Judges,

Registrar: E. Coulon,

makes the following

Order

Legal framework

- ¹ The legal framework is made up of two regulations: a basic regulation, Regulation (EC) No 733/2002 of the European Parliament and of the Council of 22 April 2002 on the implementation of the .eu Top Level Domain (OJ 2002 L 113, p. 1), and an implementing regulation, namely Commission Regulation (EC) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions

of the .eu Top Level Domain and the principles governing registration (OJ 2004 L 162, p. 40), as amended by Commission Regulation (EC) No 1654/2005 of 10 October 2005 (OJ 2005 L 266, p. 35).

Regulation No 733/2002

- 2 Recital 1 in the preamble to Regulation No 733/2002 provides as follows:

‘The creation of the .eu Top Level Domain (TLD) is included as one of the targets to accelerate electronic commerce in the e-Europe initiative as endorsed by the European Council at its meeting in Lisbon on 23 and 24 March 2000.’

- 3 Recital 13 in the preamble to Regulation No 733/2002 provides as follows:

‘[T]he Commission should, on the basis of an open, transparent and non-discriminatory selection procedure, designate a Registry. The Commission should enter into a contract with the selected Registry which should specify the conditions applying to the Registry for the organisation, administration and management of the .eu TLD and which should be limited in time and renewable.’

- 4 Article 2(a) of Regulation No 733/2002 defines the ‘Registry’ as ‘the entity entrusted with the organisation, administration and management of the .eu TLD including

maintenance of the corresponding databases and the associated public query services, registration of domain names, operation of the Registry of domain names, operation of the Registry TLD name servers and dissemination of TLD zone files.’

- 5 Article 3 of Regulation No 733/2002, entitled ‘Characteristics of the Registry’, provides as follows:

‘1. The Commission shall:

- (a) establish ... the criteria and the procedure for the designation of the Registry;
- (b) designate ... the Registry after publishing a call for expressions of interest in the Official Journal of the European Communities and after the procedure for such call has been completed;
- (c) enter into ... a contract which shall specify the conditions according to which the Commission supervises the organisation, administration and management of the .eu TLD by the Registry. ...

3. Having obtained the prior consent of the Commission, the Registry shall enter into the appropriate contract providing for the delegation of the .eu ccTLD code. ...’

- 6 Article 4 of Regulation No 733/2002 entitled ‘Obligations of the Registry’, provides as follows:

‘The Registry shall observe the rules, policies and procedures laid down in this Regulation and the contracts referred to in Article 3. The Registry shall observe transparent and non-discriminatory procedures ...’

- 7 Article 5 of Regulation No 733/2002 entitled ‘Policy Framework’, provides as follows:

‘1. After consulting the Registry and following the procedure referred to in Article 6(3), the Commission shall adopt public policy rules concerning the implementation and functions of the .eu TLD and the public policy principles on registration. Public policy shall include:

(a) an extra-judicial settlement of conflicts policy;

(b) public policy on speculative and abusive registration of domain names including the possibility of registrations of domain names in a phased manner to ensure appropriate temporary opportunities for the holders of prior rights recognised or established by national and/or Community law and for public bodies to register their names;

(c) policy on possible revocation of domain names, including the question of bona vacantia;

(d) issues of language and geographical concepts;

(e) treatment of intellectual property and other rights.

...'

- ⁸ Article 7 of Regulation No 733/2002 provides as follows: '[t]he Community shall retain all rights relating to the .eu TLD including, in particular, intellectual property rights and other rights to the Registry databases required to ensure the implementation of this Regulation and the right to re-designate the Registry'.

Regulation No 874/2004

- ⁹ Regulation No 874/2004 provides in the introductory part that it is based on 'Regulation (EC) No 733/2002 ..., and in particular Article 5(1) thereof'.

10 Recital 5 in the preamble to Regulation No 874/2004 provides as follows:

‘To ensure better protection of consumers’ rights, and without prejudice to any Community rules concerning jurisdiction and applicable law, the applicable law in disputes between registrars and registrants on matters concerning Community titles should be the law of one of the Member States.’

11 Article 8 of Regulation No 874/2004, as amended, entitled ‘Country names and alpha-2 codes representing countries’ provides as follows:

‘1. The list of names set out in the Annex to this Regulation shall only be reserved or registered as second level domain names directly under the .eu TLD by the countries indicated in the list

2. Alpha-2 codes representing countries shall not be registered as second level domain names directly under the .eu TLD.’

12 Article 10(1) of Regulation No 874/2004 provides as follows:

‘Holders of prior rights recognised or established by national and/or Community law and public bodies shall be eligible to apply to register domain names during a period of phased registration before general registration of .eu domain starts.

...’

13 Article 22(1) of Regulation No 874/2004 provides as follows:

‘An ADR procedure may be initiated by any party where:

...

(b) a decision taken by the Registry conflicts with this Regulation or with Regulation ...
No 733/2002.

2. Participation in the ADR procedure shall be compulsory for the holder of a domain name and the Registry.

...

11. ...

In the case of a procedure against the Registry, the ADR panel shall decide whether a decision taken by the Registry conflicts with this Regulation or with Regulation ... No 733/2002. The ADR panel shall decide that the decision shall be annulled and may decide in appropriate cases that the domain name in question shall be transferred, revoked or attributed, provided that, where necessary, the general eligibility criteria set out in Article 4(2)(b) of Regulation (EC) No 733/2002 are fulfilled.

...

13. The results of ADR shall be binding on the parties and the Registry unless court proceedings are initiated within 30 calendar days of the notification of the result of the ADR procedure to the parties.'

Background to the dispute

- 14 The domain name system makes it possible to browse the internet by linking domain names with numbers which identify computers connected to the internet. The management of the technical aspects of this service is coordinated by a non-profit organisation governed by the law of California (United States of America), known as the 'Internet Corporation for Assigned Names and Numbers' ('ICANN'). This organisation is also responsible for managing the root server system and the top level domains system. The top level domain (the 'TLD') brings together a group of computers connected to the internet. It appears on the right of any domain name and comprises a full stop and a special code, a full stop and a generic code, for example '.com', '.net' or '.org', or a full stop and a geographical code such as '.lu'.
- 15 On 21 March 2005, the Board of ICANN authorised its president and general meeting to conclude an agreement delegating the management of the '.eu' TLD to the European Registry for Internet Domains ('EURid'), a non-profit organisation governed by Belgian law, designated by the Commission of the European Communities (see Commission Decision 2003/375/EC of 21 May 2003 on the designation of the .eu Top Level Domain Registry (OJ 2003 L 128, p. 29)).
- 16 The applicant, Inet Hellas Ilektroniki Ipiresia Pliroforion EPE (Inet Hellas), is a company operating in the sector of internet telecommunications services. In particular, it registers domain names of the kind 'name.co.gr' for third parties as it is responsible for the second level domain '.co', of the '.gr' TLD.
- 17 On 17 April 2001, the applicant brought before the Office for Harmonisation in the Internal Market (OHIM) an application for registration of the trade mark 'CO' as a Community trade mark under Council Regulation No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (replaced by Council

Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

- 18 On 5 August 2002, the Community trade mark 'CO' was registered by OHIM under No 2191500.
- 19 On 7 December 2005, the applicant submitted an application to EURid to register the domain '.co' as a second level domain of the '.eu' TLD.
- 20 EURid refused to register the domain '.co' as a second level domain of the '.eu' TLD. In particular, in a letter of 7 December 2005 EURid replied to the applicant that registration of the domain in question was not permitted under Regulation Nos 733/2002 and 874/2004, because country codes cannot be registered as second level domains and the two letters of the suffix '.co' correspond to the alpha 2 code for Colombia.
- 21 In response to the refusal by EURid to register the domain '.co' as a second level domain of the '.eu' TLD, the applicant brought the matter before the Commission on 23 December 2005, setting out the reasons why it believed that the refusal was contrary to the rules of the European Union.
- 22 The Commission replied to that email by a letter of 31 January 2006 ('the contested decision'), which was communicated to the applicant on 13 February 2006. In the contested decision the Commission first of all explained to the applicant that Regulation Nos 733/2002 and 874/2004 provide for an alternative dispute resolution

procedure which may be used, in particular, where a decision taken by the Registry contravenes Regulation No 733/2002 or Regulation No 874/2004. The Commission then stated that it was not in a position to act as an appeal body for decisions taken by the Registry and that accordingly it was 'impossible [for it] to review the decision taken by EURid'. The Commission none the less stated that, in so far as its exchanges with EURid related to the interpretation of Regulation No 874/2004, it provided the applicant with certain clarifications which might be helpful to it. The Commission also gave its interpretation of the applicable provisions and provided a reply to the applicant's allegations. Finally, the Commission concluded that whilst it understood perfectly the applicant's interest in registering the domain 'co' as a second level domain of the 'eu' TLD, it could not but uphold EURid's decision of 7 December 2005 to refuse to register that domain.

Procedure and forms of order sought

- ²³ By an application lodged at the Registry of the General Court on 7 April 2006 the applicant brought this application.
- ²⁴ The composition of the chambers of the General Court having been changed, the Judge-Rapporteur was assigned to the Fifth Chamber, to which this case was consequently allocated.
- ²⁵ In the context of the measures of organisation of procedure laid down in Article 64 of the Rules of Procedure of the General Court, the Court requested the Commission to lodge a document. The Commission acceded to this request within the period laid down. By a document lodged at the Registry of the General Court on 8 April 2009, the applicant submitted its observations on this document.

26 The applicant claims that the Court should:

- ‘make a finding of invalidity in regard to the contested measure’;
- annul the contested measure;
- order the Commission to pay the costs.

27 The Commission contends that the Court should:

- dismiss the application as inadmissible;
- in the alternative, dismiss it as unfounded;
- order the applicant to pay the costs.

Law

- ²⁸ Under Article 113 of the Rules of Procedure, the General Court, giving its decision in accordance with Article 114(3) and (4) of those Rules, may at any time of its own motion, after hearing the parties, decide whether there exists any absolute bar to proceeding with an action. In this case the Court considers that it has sufficient information from the documents on file and has therefore decided, without opening the oral procedure, to determine the proceedings on the plea of an absolute bar owing to the absence of any measure in respect of which proceedings may be brought since the parties have made submissions on this point in their pleadings.

Arguments of the parties

- ²⁹ Without raising a plea of inadmissibility by a separate document within the meaning of Article 114(1) of the Rules of Procedure, the Commission first relies on the absence, in this case, of a measure capable of producing binding legal effects such as to affect the interests of the applicant by significantly altering its situation.
- ³⁰ The Commission maintains that, as is plainly apparent from an analysis of the contested measure, the latter is an ‘opinion of the Commission’ simply giving particulars regarding the procedure followed. It is in no way a decision taken by a competent body, nor is there anything to indicate an intention on its part to adopt such a decision. Moreover, the Commission considers that, inasmuch as the contested measure does not produce binding legal effects in respect of the applicant, it has no interest in seeking its annulment.
- ³¹ The Commission argues that the explanations provided in the contested measure do not adversely affect the applicant’s legal situation or prevent it from exercising the

rights of action open to it or of having recourse to the alternative dispute resolution procedure under Article 22 of Regulation No 874/2004.

- 32 The Commission asserts that the decision by EURid refusing to register the domain 'co' as a second level domain of the 'eu' TLD is an autonomous enforceable act which, as such, affects the rights and obligations of the claimant without any additional act by the Commission being necessary.
- 33 Secondly, the Commission denies the applicant's claims that 'management of the Community register has been entrusted by the Commission to EURid' and the relationship between them is one of agency. The Commission considers that to be an erroneous interpretation of the legal relationship between it and EURid and of the division of functions and tasks assigned by the Union legislature.
- 34 The Commission also maintains that it is not possible to apply the case-law concerning acts of the delegate authority to the present dispute inasmuch as it did not delegate authority in this case.
- 35 Thirdly, the Commission maintains that the system established by Regulation Nos 733/2002 and 874/2004 provides adequate legal protection for persons who wish challenge a registry decision. It is open to any person concerned, first, to appeal to the national courts and, secondly, to use the alternative dispute resolution procedure (Article 4(2)(d) of Regulation No 733/2002 (use of 'judicial procedures') and Article 22 of Regulation No 874/2004 (ADR procedure)).

36 Fourthly, the Commission considers that the applicant's claim that the present case concerns the scope of protection granted to the Community trade mark, and therefore, pursuant to Regulation No 40/94, the competent court for these disputes is the General Court, is unfounded in the light of the conditions laid down in Article 63 of Regulation No 40/94 (now Article 65 of Regulation No 207/2009).

37 In the first place, the applicant counters by arguing that the contested measure is capable of constituting the subject-matter of an action for annulment. The form in which measures are adopted is irrelevant with regard to the 'possibility of their being challenged in an application for annulment'; the sole determining factor is whether the contested measure produces mandatory effects, which must be assessed by reference to its substance. It is, the applicant adds, settled case-law that the legal classification of acts of the institutions must comply with objective criteria based on the regulatory content of those acts and not on their title or on the declared intentions of their authors.

38 In addition, the applicant argues that, according to settled case-law, 'only measures which definitively determine the position of the Commission or the Council upon the conclusion of such a procedure, which are not intermediate measures whose purpose is to prepare for the definitive decision, constitute challengeable measures'. In the present case, it may be inferred from the contested measure that the Commission in no way intended to undertake a fresh and more extensive consideration of the merits with a view to adopting a definitive decision.

39 Secondly, the applicant contests the Commission's 'lack of jurisdiction' in the matter, to the extent that that would negate the supervisory role that it must play in the management of the '.eu' TLD.

- 40 In fact, according to the applicant, Regulation No 733/2002 confers on the Commission an important role in the organisation, functioning and supervision of the entity in charge of the organisation, administration and management of the ‘eu’ TLD. More specifically, under Article 3 of Regulation No 733/2002, the Commission is to define the criteria and the procedure for the designation of the registry, to designate the latter and to conclude a contract with it. The purpose of that contract is, in particular, to specify ‘the conditions according to which [the Commission] supervises the organisation, administration and management of the “eu” TLD by the Registry’ under Article 3(1)(c) of Regulation No 733/ 2002.
- 41 The applicant also observes that the regulation does not state the degree to which the Commission must exercise its supervision. The requisite degree may be determined from the judgment of the Court of Justice in Case 9/56 *Meroni v High Authority* 1956 ECR 133, in which it was affirmed that a delegation of powers can only involve clearly defined executive powers, the use of which must be entirely subject to the supervision of the Commission. Consequently, when a person is injured by the acts or omissions of the entity to which powers have been delegated, responsibility for those acts and omissions and the status of defendant does not fall on that entity, which is merely exercising executive powers, but on the Commission, which exercises the substantive supervisory role.
- 42 The applicant infers from that judgment that acts of the delegate authority must be equated with acts of the delegating authority and may be challenged on the same basis. This stems from the fact that only ‘powers of implementation’ in the strict sense may be delegated to a third party by an institution of the European Union, so that the institution should legally and may, in practice, be responsible for the acts of the delegate. Even on the supposition that it is not automatically responsible for acts of third parties to whom it delegates powers, it should nevertheless monitor those third parties closely and effectively. The applicant adds that, whilst it may be true that no supervisory obligation is provided for by secondary legislation, that obligation none the less arises from the nature and function of the delegation of powers to third parties.

43 In addition, according to the applicant, under the contract of 12 October 2004 between EURid and the Commission, the latter has the right to terminate the contract if EURid does not comply with its contractual obligations. Similarly, Clause II.2.1 of the contract expressly provides that the Commission may give instructions and guidelines to EURid. Finally, Clause II.12 of contract confers on the Commission rights of supervision over EURid and Clause I.6.8 of the contract imposes obligations vis-à-vis the Commission on EURid. In the framework of its contractual relationship with EURid, it is open to the Commission to address to EURid guidelines with which EURid is required to comply. Accordingly, the contested measure binds EURid as regards the interpretation of the provisions at issue and precludes any possibility of registering the domain ‘.co’ as a second-level domain of the ‘.eu’ TLD since such registration would infringe the contract entered into by EURid with the Commission, giving the latter grounds to terminate the contract. All the rights and obligations assigned to the contracting parties point to a hierarchical relationship of supervision exercised by the Commission over EURid.

44 The applicant further disagrees with the Commission’s argument that there is a contractual provision exempting it from liability ‘for the acts and omissions of the parties or their subcontractors during the execution of the contract, unless expressly provided for in writing’. The applicant considers that this contractual clause is irrelevant inasmuch as it concerns exclusively relations between the parties to the contract, that is to say, the Commission and EURid, and cannot be applied to relations between the Commission and third parties. First, the liability of the Commission is governed by the law of the European Union and the Commission cannot exempt itself in advance from this liability; secondly, a contractual clause which excludes the liability of a contractor in regard to third parties would not be enforceable against those third parties who could invoke this unenforceability at any moment, without limitation in time.

45 The applicant contests the Commission’s argument that its acts are not binding on EURid. This argument is ‘contrary to logic’ and incompatible with the legal relationship which binds the Commission to EURid. In fact, it is not possible to imagine that the agent or delegate is not bound by the instructions of the principal or delegator. Furthermore, the contract between EURid and the Commission expressly provides that the latter is liable for the directives that it issues to EURid. This contractual

clause would have no meaning if EURid were intended to 'operate independently of the Commission'.

⁴⁶ Thirdly, the applicant puts forward its right to effective judicial review of the legality of the Commission decision.

⁴⁷ According to the applicant, under Articles 7, 220 and 230 of the EC Treaty, the court ordinarily competent in the present case is the General Court. Since Regulation No 733/2002 was adopted by the Council under Article 156 EC, it is plain that the creation and operation of the 'eu' TLD form an integral part of the legal order of the European Union and are accordingly subject to judicial review by the Court of Justice and the General Court.

⁴⁸ In addition, the applicant submits that, under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, everyone has the right to a fair trial before an impartial court. The expression 'impartial court' must be taken to mean the court that is legally competent to decide. The General Court is the only possible impartial court in regard to a dispute arising in connection with the application at European level, rather than national level, of the powers of the European Union in relation to the 'eu' TLD.

⁴⁹ The absence, the applicant argues, of any review of the lawfulness of the acts of an institution that has delegated certain of its powers to a legal person governed by private law constitutes a lacuna in the judicial protection afforded by the legal order of the Union. That lacuna cannot be made good by individuals being allowed to apply to national courts for the annulment of acts of EURid.

50 Moreover, the applicant observes that, under Article 63 of Regulation No 40/94, the General Court is also competent in regard to disputes between OHIM and individuals in the context of Community trade mark registration. According to the applicant, the analogy is plain. OHIM is responsible for the registration of trademarks, whilst EURid operates as a registry responsible for the registration of Internet addresses. The difference is that a trade mark distinguishes goods and services in the real world, while an electronic address distinguishes goods and services in the world of virtual or online trade. Accordingly, in spite of a different legal form and a different manner of functioning in practice, OHIM and EURid undertake 'parallel tasks'. It is not logical for OHIM decisions to be subjected to judicial review by the General Court, while those of EURid are exempt. As regards OHIM, the regulation under which it was established expressly provides for the corresponding procedure. Conversely, since no provision has been made for acts of EURid to be brought before the General Court for review, it is at least necessary to review the legality of acts of the Commission qua 'supervisory Community institution'.

51 Fourth, the applicant submits that it has an interest in bringing the action. Indeed, the negative effects of the contested decision on its situation and in particular the infringement by the Commission of its 'absolute right' to the Community trade mark CO in so far as it has wrongly determined that it has no right to register a second level domain containing this mark bears out its interest in seeking annulment of the contested measure. In addition, the applicant considers that the dispute concerns the scope of protection conferred on the holder of a Community trade mark. Pursuant to Council Regulation No 40/94, the competent court is therefore the General Court.

52 The contested decision was adopted by the Commission, which is also the supervisory body of EURid, in the context of an appeal against a decision of EURid. The present application for annulment of the contested measure should therefore be considered admissible that measure infringes in particular its Community trade mark CO.

Findings of the Court

- 53 According to settled case-law, measures producing binding legal effects of such a nature as to affect the interests of the applicant, by significantly altering the applicant's legal situation, may form the subject-matter of an action for annulment. To determine if a measure produces such effects, regard must be had to its substance (Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 9; Case T-160/98 *Van Parijs and Pacific Fruit Company v Commission* [2002] ECR 233, paragraph 60; and Order in Case T-123/03 *Pfizer v Commission* [2004] ECR II-1631, paragraph 21).
- 54 In the present case, the contested measure comprises a simple letter signed by Mr. N., head of Unit 1 'Internet, security of networks and information' of Directorate A 'Internet, network security and general affairs' of the 'Information Society' Directorate General of the Commission, in reply to a mail sent to it by the applicant on 23 December 2005 setting out the reasons why it considered EURid's refusal to register the domain '.co' as a second level domain of the '.eu' TLD to be contrary to the rules of the European Union.
- 55 According to settled case-law, the mere fact that a letter is sent by a Community institution to its addressee in response to a request made by the latter is not enough for it to be treated as a decision against which an action for its annulment may be brought (Case T-277/94 *AITEC v Commission* [1996] ECR II-351, paragraph 50; orders of the Court in Case T-130/02 *Kronoply v Commission* [2003] ECR II-4857, paragraph 42; and in Case T-369/03 *Arizona Chemical and Others v Commission* [2005] ECR II-5839, paragraph 56).

- 56 It should be noted that, in the contested measure, the Commission merely gave its interpretation of the provisions applicable, and stated that the decision by EURid seemed to it to be in conformity with those provisions (see paragraph 22 above).
- 57 It is important, moreover, to emphasize that the decision refusing to register the domain ‘.co’ as a second level domain of the ‘.eu’ TLD was taken by EURid in its capacity as the TLD Registry.
- 58 It should be recalled, in this connection, that Regulation No 733/2002 established the registry and defined its competences. Pursuant to Article 2(a) and to Article 4(2)(a) of this regulation, the registry is entrusted with the organisation, administration and management of the ‘.eu’ TLD. Under Article 4(2)(b) of that regulation, the registry is to register domain names requested by certain persons in the ‘.eu’ TLD through any accredited registrar. Under Article 4(2)(c), the registry is to impose fees directly related to costs incurred and, under Article 4(2)(d), it is to implement the extra-judicial settlement of conflicts policy.
- 59 In addition, in accordance with Article 4(2)(e) of Regulation No 733/2002 the registry is to adopt procedures for the accreditation of ‘.eu’ registrars, carry out that accreditation and ensure effective and fair conditions of competition between .eu registrars. Under Article 4(2)(f) of that regulation, the registry is also to ensure the integrity of the databases of domain names.
- 60 As regards the Commission, Article 3(1)(a) and (b) of Regulation No 733/2002 provides that the Commission is competent to lay down the criteria and the procedure for the designation of the registry, to designate the latter, after the publication of a call

for expressions of interest in the *Official Journal of the European Union* and after the call for expressions of interest has been closed.

- ⁶¹ Under Article 5(1) of Regulation No 733/2002, the Commission is to adopt, after consulting the registry, public policy rules concerning the implementation and functions of the '.eu' TLD and the public policy principles on registration.
- ⁶² It was in this context that the Commission appointed, as the registry, EURid, a non-profit association under Belgian law (see paragraph 15 above), adopted Regulation No 874/2004 and concluded a contract with EURid, laying down the conditions under which it supervises the organisation, administration and management of the '.eu' TLD by EURid.
- ⁶³ It is clear from all the foregoing that Regulation No 733/2002 gives the registry the power to refuse the registration of a second level domain and that, contrary to the applicant's assertion, it is not a power delegated to EURid by the Commission. Therefore, *Meroni v High Authority*, cited at paragraph 41 above, is devoid of any relevance in the present case.
- ⁶⁴ The applicant submits, in essence, that, in the framework of supervision by the Commission of the registry and under the contract that it entered into with it, it is open to the Commission to issue guidelines binding on the registry, in particular as regards the registration of a second level domain; accordingly, inasmuch as the contested

measure excludes any possibility of registration by the registry of the domain ‘.co’ as a second level domain of the ‘.eu’ TLD or declines to issue any such guidelines on the registration of this domain requested by the applicant, it constitutes a measure producing binding legal effects capable of forming the subject-matter of an application for annulment.

- ⁶⁵ In this connection, it should be noted that a power of the Commission to issue to the registry binding guidelines relating to the registration of a specific second level domain cannot be presumed in the absence of a specific provision contained in the Treaty or in binding acts adopted by the institutions (see, to that effect, Case T-113/89 *Nefarma v Commission* [1990] ECR II-797, paragraph 69 and the case-law cited).
- ⁶⁶ Neither Regulation No 733/2002 nor Regulation No 874/2004 contain provisions conferring such power on the Commission.
- ⁶⁷ Moreover, even assuming that such a power could be conferred on the Commission solely under the provisions of the contract concluded between it and EURid, the clauses relied on by the applicant (see paragraph 43 above) relate to financial relations between the contracting parties. Neither these clauses nor any other clause of this contract confer on the Commission the power to issue to the registry binding guidelines relating to the registration of a specific second level domain.
- ⁶⁸ In regard to the arguments of the applicant based on the principle of judicial protection, it should be noted that, under the ‘Terms and Conditions governing Registration of “.eu” domain names’ adopted by EURid under Article 5(3) of Regulation

No 733/2002, ‘in the event of a dispute, disagreement or action between the registry and an applicant for registration the courts of Brussels (Belgium) shall have sole jurisdiction’ except for cases where a party has voluntarily decided to initiate a procedure for alternative dispute resolution. Furthermore, it appears from point B.12 (a), read in conjunction with point A.1 of the rules relating to the settlement of disputes concerning ‘.eu’ domains, produced by the Commission at the request of the Court, that the applicant for registration of a domain name has the right to initiate judicial proceedings before a court of the registry’s principal place of business (namely Brussels), against a decision of the latter refusing registration of a second level domain.

⁶⁹ In addition, under Article 22(1) of Regulation No 874/2004 an ADR procedure may be initiated where a decision taken by the registry conflicts with that regulation or with Regulation No 733/2002. Under Article 22(11) the ADR panel is the competent body to rule on the annulment of the decision.

⁷⁰ Under Article 22(13) of Regulation No 874/2004, the results of this ADR procedure are binding on the parties and the registry unless court proceedings are initiated within 30 calendar days of notification of the result of the ADR procedure to the parties.

⁷¹ Accordingly, Regulation No 874/2004 and the ‘Terms and Conditions governing Registration of .eu domain names’ adopted by the registry, and the rules on the settlement of disputes concerning ‘.eu’ domains, provide two rights of action against the

decisions of EURid: an ordinary action before the courts of Brussels and an extra-judicial remedy before the alternative dispute resolution panel, whose decision may, in any event, be contested before the ordinary courts.

⁷² This conclusion is corroborated by judgment No 2905/2009 of 4 May 2009 of the Polimeles Protodikio Athinon (Multi-Member Court of First Instance, Athens, Greece), added to the file at the applicant's request. Whilst it is true that, by this judgment, the Polimeles Protodikio Athinon dismissed the applicant's appeal against the registry's refusal to register the second level domain requested by the applicant, it is no less true that this dismissal was based on the conclusion that the Greek court in question was not competent to rule on this dispute, which, the judgment further held, fell within the exclusive jurisdiction of the Belgian courts. It cannot, therefore, be maintained, on the basis of that judgment, that it was not possible to request a court to review the legality of the decision by EURid refusing to register the domain 'co' as a second level domain of the 'eu' TLD.

⁷³ In regard to the applicant's claim that this case concerns the scope of protection given to the Community trade mark CO, and its argument that the court competent to determine this dispute is therefore the General Court pursuant to Regulation No 40/94, it is sufficient to observe that, under Article 63 of Regulation No 40/94, it is only against decisions of the Boards of Appeal that an action may be brought before the Court of Justice, and that such right of action is enjoyed by any party to the proceedings before the Board of Appeal adversely affected by its decision.

⁷⁴ However, it is not apparent from the file that the applicant had recourse to the remedies referred to in Article 63 of Regulation No 40/94. The General Court cannot therefore be considered competent on the basis of this provision in the present case. Therefore, the applicant's argument that the General Court is the court competent to determine this dispute under Regulation No 40/94 cannot be accepted.

⁷⁵ In the light of all those considerations, the view expressed by the Commission in the contested measure cannot be regarded as being in the nature of a decision capable of producing legally binding effects such as to affect the interests of the applicant by significantly altering its legal situation. Consequently, the application for annulment must be declared inadmissible without any need to rule on the applicant's interest in bringing the proceedings.

Costs

⁷⁶ Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the defendant has been unsuccessful, it must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby orders:

1. The action is dismissed.

- 2. Inet Hellas Ilektroniki Ipiresia Pliroforion EPE (Inet Hellas) shall bear its own costs and those incurred by the European Commission.**

Luxembourg, 15 December 2009.

E. Coulon

Registrar

M. Vilaras

President